84-803

Office - Supreme Court, U.S.
FILED
OCT 15 1984
ALEXANDER L. STEVAS,
CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

CAROLIN BURBANK, RESPONDENT

**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN**

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

EDWARD REILLY WILSON
Deputy Chief, Civil and Appeals

TIMOTHY A. BAUGHMAN (P-24381)
Principal Attorney
Research, Training and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5794

QUESTION PRESENTED

DOES YBARRA V ILLINOIS COMPEL THE CONCLUSION, AS THE MICHIGAN COURT OF APPEALS HELD IT DOES, THAT A SEARCH WARRANT FOR PRIVATE PREMISES DOES NOT PERMIT A SEARCH OF REASONABLE SCOPE AND INTENSITY OF PERSONS ON THE PREMISES WHERE THE ITEMS PARTICULARIZED IN THE WARRANT MIGHT REASONABLY BE EXPECTED TO BE CONCEALED ON THE PERSON (PARTICULARLY WHERE THERE IS REASON TO BELIEVE THAT AN OCCUPANT IS CONCEALING SOMETHING)?

TABLE OF CONTENTS

Page

Question Presented.....1

Index of Authorities.....3,4

Opinions Below.....6

Statement of Jurisdiction.....6

Constitutional Provisions Involved.....7

Statement of the Case.....8

Reasons for Granting the Writ.....11

Conclusion.....36

Appendix

"A" Opinion of the Michigan Court of Appeals.....38

"B" Order of the Michigan Supreme Court.....49

INDEX OF AUTHORITIES

CASE PAGE

City of Tacoma v Mondelli,
495 P 2d 682 (Wash App 1972)..... 29

Commonwealth v Smith,
348 NE 2d 101 (1976)..... 27

Commonwealth v Snow,
298 NE 2d 804 (Mass 1973)..... 25

Guerra v State,
496 SW 2d 92 (Ct App Tex 1974)..... 28

Martinez v State,
504 SW 2d 897 (Ct App Tex 1974).... 28

Michigan v Long,
__ US __, 77 L Ed 2d 1201 (1983)... 35

People v Harrison,
226 NE 2d 418 (1967)..... 25

People v Harvey,
38 Mich 39; 195 NW 2d 773 (1972)... 33

People v Kielczynski,
264 NE 2d 767 (Ill App 1970)..... 25

People v Lujan,
484 P 2d 1238 (Colo 1971)..... 29

People v McHale,
281 NE 2d 776 (1972)..... 25

People v Nash,
418 Mich 196 (1983)..... 35

INDEX cont'd.

Case Page

People v Pugh,
69 Ill App 2d 312,
217 NE 2d 557 (1966)..... 24

State v Kurtz,
612 P 2d 749 (Or App, 1980)..... 21

State v Loudermick,
494 P 2d 1174 (Kansas 1972)..... 27

State v McClelland,
523 P 2d 357 (Kansas 1974)..... 28

United States v Di Re,
332 US 581 (1947).....29-31

United States v Johnson,
475 F 2d 977 (CS DC, 1973)..... 12

United States v Kralik,
611 F 2d 343, 345 (CA 10 1979)..... 28

United States v Micheli,
487 F 2d 429 (CA 1, 1973).....15,19

United States v Teller,
397 F 2d 494 (CA 7, 1968),
cert den, 393 US 937 (1968)..... 16

Ybarra v Illinois,
444 US 85 (1979).....1,10-12,18,31,35

Other Authorities

28 USC § 1257(3)..... 7

MCL 780.656.....33

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER

vs.

CAROLIN BURBANK, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF MICHIGAN

NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Edward Reilly Wilson, Deputy Chief, Civil and Appeals, and Timothy A. Baughman, Principal Attorney, Research, Training and Appeals, and pray that a writ of

certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above-entitled cause on May 18, 1984, leave to appeal denied by the Michigan Supreme Court September 7, 1984, (one justice dissenting).

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported as yet and is appended as Appendix A. The Order of the Michigan Supreme Court is unreported and is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgement of the Michigan Court of Appeals was entered on May 18, 1984. The judgment of the Michigan Supreme Court

was entered on September 7, 1984. The jurisdiction of this Court is invoked under 28 USC § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was charged with possession with intent to deliver methamphetamine. At an evidentiary hearing the following facts were revealed.

Police officer Charnitta Perdue testified that she was a part of a crew executing a search warrant for 17247 Hawthorne, in the City of Detroit (R,3-4). The warrant was for controlled substances, items establishing control of the premises, and pre-recorded secret service funds used in an earlier buy.

When officer Perdue entered the dwelling Respondent was up against a wall (there were 5 adults and several children in the dwelling at the time) (R,8-10). Defendant was observed to have on a dance leotard top, "and it was quite obvious that she had something in her brassiere"; that is, two bulges (other than those one might normally expect to find) (R,11-12). The officer had no idea what the bulges were (R,14). The officer (a female) searched defendant to discover the cause

of the bulges, and discovered two vials containing methamphetimine and a glass tube (R,14-16).

After argument, the trial judge found that that "search and seizure was unlawful and unreasonable" and dismissed as to this defendant (R,18).

The Michigan Court of Appeals affirmed the suppression and dismissal, holding: "We find this case is controlled by Ybarra v Illinois,...we are unable to (make a distinction between a public place and a private dwelling).... Defendant could legitimately expect as much privacy, if not more, when visiting her friends than while being a patron in a public place."(slip opinion at 1,3).

On September 7, 1984, the Michigan Supreme Court denied Petitioner's timely application for leave, one justice dissenting.

REASONS FOR GRANTING THE WRIT

Ybarra v Illinois, 444 US 85 (1979) should not be read as controlling the instant case. The Michigan Court of Appeals held that it is controlling, and this application of precedent from this Court constitutes an issue requiring the plenary review of this Court. The search warrant involved in Ybarra authorized the search of the "Aurora Tap Tavern... Also the person of 'Greg' the controlled substances, money, instrumentalities and narcotics paraphernalia used in the manufacture, processing and distribution of controlled substances." This Court

stated that the search of Ybarra's person could not be justified by the warrant, holding that the warrant gave the officers "no authority whatever to invade the constitutional protections possessed individually by the tavern's customers." 62 L Ed 2d at 246. Ybarra is distinguishable from the case at bar in several important respects: 1) Ybarra involved a place of public accommodation, this case a private residence; 2) in Ybarra Heroin packets were observed only behind the bar and on the person of the bartender; here, someone in the house had sold Heroin to an informant; 3) Here, a bulge which was out of the ordinary was seen on Respondent's person; not so in Ybarra.

The Court in United States v Johnson, 475 F 2d 977 (CS DC, 1973) held that the

search of the purse of a visitor pursuant to a search warrant for premises was proper where the purse was not being held by the person. Thus, the court said, the search was not that of the person, and, notwithstanding defendant's status as a visitor, the purse could be searched as it could have concealed the items named in the warrant. 475 F 2d at 979. Chief Judge Bazelon, concurring and dissenting, agreed that the suppression order could not stand, but for different reasons. He disagreed that the search of the purse could be justified under the warrant, because the officers knew defendant to be a visitor on the premises. However, Judge Bazelon noted in passing that the warrant would authorize the search of a person named in the warrant as the occupant of the premises (though

apparently not named as a place to be searched):

> The warrant...authorized the search of an apartment that was...occupied by John Doe alias Pete described as a negro male, 49-50 years, 165 lbs., 5'6", medium complexion. I do not doubt that this authorized the search of 'Pete' as well as his apartment. But the warrant did not authorize a search of an individual the police knew to be a mere visitor in the apartment (emphasis added). 475 F 2d at 980.

Thus, it appears that Judge Bazelon would allow the search of a person on the premises pursuant to a search warrant for premises where the items sought could be concealed on the person and the officers

executing the warrant do not have knowledge that the person has no nexus with the premises. At the very least it is fair to say that Judge Bazelon would permit searches of persons named in the warrant as having some nexus with the premises.

The holding was similar in United States v Micheli, 487 F 2d 429 (CA 1, 1973). The case involved a search warrant for certain business premises, and the search of defendant's brief case which was within the premises. The items were counterfeit notes. The court carefully analyzed the problem, saying that a focus on actual physical possession was at once too broad and too narrow -- the approach of "immunizing from a search under sanction of a premises warrant any item within the physical possession of an

individual on the premises," United States v Teller, 397 F 2d 494 (CA 7, 1968), cert den, 393 US 937 (1968), is too broad in that "a search warrant could be frustrated to the extent that there are hands inside the premises to pick up objects before the door is opened by the police"; it is too narrow in that many personal effects which may be set down should not be subject to search. The court turned to an examination of the relationship between the person and the place:

> ...we base our decision on the fact that, as co-owner of the Hillside press (the premises), appellant was not in the position of a mere visitor or passerby who suddenly found his belongings vulnerable to a search of the premises. He had a

> special relation to the place, which meant that it could reasonably be expected that some of his personal belongings would be there. Thus, the showing of probable cause and necessity which was required prior to the initial intrusion into his office reasonably comprehended within its scope those personal articles, such as his brief case, which might be lying about the office. The search of his brief case, under these circumstances, was properly carried out within the scope of the warrant. 487 F 2d at 432.

Petitioner submits that this "relationship to the premises searched" test is a sufficient, but not necessary, ground for allowing a search of persons

on private premises when a warrant is executed. The relationship is not necessary, for petitioner urges this Court to ground its decision on a distinguishing aspect between Ybarra and the present case; namely, the fact that Ybarra involved a public place and the instant case a private residence. Petitioner submits that a "relationship of the person to the premises" test is unsatisfactory as a necessary condition for searches of persons on private premises. The search of persons on private premises under a warrant for the premises should be permitted where the items sought could be concealed on the person because it is reasonable to believe the items might be found on such persons, and thus the search is within the scope of the warrant.

In a concurring opinion in United States v Micheli, supra, Judge Campbell rejected the "relationship of the person to the place" standard, arguing that it "grants possible sanctuary to all manner of arguably intimate personal effects carried upon the premises and then set down":

> A search of such objects is neither more nor less intrusive than would be the search of similar objects whose owner, having deposited them, had left the premises before the police arrived. Any search is an invasion of privacy; but I think the cause for issuance of the original warrant allows a search of relevant personal effects not in the possession of their owner as well as of all other relevant

objects on the premises. The contraband or incriminating evidence covered by the warrant is as likely to be within brief cases or bags just brought on the premises as within other objects in the premises (footnote omitted). It is true that if the officer knows the owner of the brief case has no 'relationship' to the premises, he might have less reason to search. But in many cases the police would have no way of knowing, in advance, what is the individual's actual connection with the premises. When the stranger in the betting parlor solemnly announces that he is the family doctor, I am less sure than is the court that I would require the

police to believe him -- or inquire further before searching his bag. 487 F 2d at 433.

In State v Kurtz, 612 P 2d 749 (Or App, 1980) the court approved the search of a daypack under a search warrant for premises for narcotics, declining to adopt defendant's proposed test that guests with identifiable personal property should be allowed to identify and claim their property before the search. The court found persuasive the concerns voiced by the trial court:

> It just seems to me that it would not be practicable to have a rule that everything that belongs to somebody else in a house is therefore not subject to search when the Magistrate (has)

> authorized (a) search (of) the house. As a practical matter I don't see how we can impose an additional burden on law enforcement officers to have to take some further steps to identify what in the house belonged to the owner or what in the house belonged to the occupants as opposed to what in the house may belong to the visitors, so I am going to deny the motion to suppress.

Similarly, petitioner submits that in cases of searches of persons on the premises officers would rarely know the individual's actual connection with the premises, nor should officers be required to believe assertions of "non-relationship." A search of reasonable scope and intensity of persons on private premises

pursuant to a search warrant for those premises, where the items sought could easily be concealed on the person, should be permitted on the basis that the pockets of persons are places within the premises just as are desk drawers and closets. Both the majority and the concurrence did remark in passing that personal searches were not permitted pursuant to a search warrant for premises, Judge Campbell stating that such as an "exception" to what he perceived to be the rule that a search warrant "...justifies whatever intrusion may result from searching all articles found on the premises having characteristics making it possible for them to harbor the matter described in the warrant." 487 F 2d at 433. As will be set forth more fully subsequently, petitioner submits that the supposed

"exception" is ill-founded and unjustifiable where applied to private premises.

Several state courts have also had occasion to grapple with the issue. In People v Pugh, 69 Ill App 2d 312, 217 NE 2d 557 (1966), defendant was con- victed of unlawful possession of narcotics as a result of a search of his person when he entered an apartment where police officers were engaged in the execution of a search warrant. The officers had fruitlessly been searching the premises for some fifteen minutes. The court held that "the execution of search warrants in narcotics cases is a risky business at best, and unless the police search all persons present on the premises they endanger both themselves and the search they are making....The United States Constitution prohibits unreasonable

searches...the search of Raymond Pugh under the circumstances of this case cannot be so classified." See People v Kielczynski, 264 NE 2d 767 (Ill App 1970), where in upholding the search of a person pursuant to a warrant for premises for gambling instruments, implements, and apparatus, the search revealing records of horse race bets, the court said: "We conclude that the search of defendant's person, who was on the premises described in the instant search warrant, was reasonable and necessary for the execution of the warrant." 264 NE 2d at 771. See also People v Harrison, 226 NE 2d 418 (1967); People v McHale, 281 NE 2d 776 (1972).

A barber shop was the premises described in Commonwealth v Snow, 298 NE 2d 804 (Mass 1973), and the articles

named were narcotics and narcotics paraphernalia. Defendant was not the owner of the premises, but was present when the warrant was executed. His coat was hanging on a hook, was searched, and Heroin found. The court stated that the search was not a search of the person, but went on to say that the warrant authorized the police

> to search anywhere within the four walls of the barber shop where the contraband described in their warrant might be located. They could search the various rooms, closets or storage places, including possible concealed storage places. They could look on, under, behind, or inside any piece of furniture, container or other object to facilitate their search,

> and search the pockets, liners or any other parts of articles of clothing where the objects of their search might be secreted. 298 NE 2d at 812.

See also Commonwealth v Smith, 348 NE 2d 101 (1976).

State v Loudermick, 494 P 2d 1174 (Kansas 1972) involved the search of a person on the premises. Again, narcotics were the object of the search.

> Narcotics, such as Heroin, are easily concealed on a person and may readily be disposed of. Where, as in this case, probable cause to believe that a drug is kept or concealed on certain described premises is established to the

> satisfaction of a proper magistrate, the search of a person found on the premises in the execution of a search warrant is not only reasonable, but necessary to secure effective enforcement of the Uniform Narcotics Drug Act. 494 P 2d at 1178.

See also State v McClelland, 523 P 2d 357 (Kansas 1974); Martinez v State, 504 SW 2d 897 (Ct App Tex 1974); Guerra v State, 496 SW 2d 92 (Ct App Tex 1974); and United States v Kralik, 611 F 2d 343, 345 (CA 10 1979) (allowing the search of a suitcase found in an auto where the officers had a warrant to search the auto because the Fourth Amendment does not require a search warrant for each container within a larger container where the warrant covers the search of the

larger container -- "Theory should not be entirely divorced from practicality.")

Several cases state the proposition that a search warrant for premises does not include a right to search persons on the premises. See e.g., People v Lujan, 484 P 2d 1238 (Colo 1971); City of Tacoma v Mondell, 495 P 2d 682 (Wash App 1972). Most of these cases give little or no discussion to the rationale of such a rule, simply citing United States v Di Re, 332 US 581 (1947) for the proposition. But on close analysis, Di Re does not support the rule.

Di Re involved a warrantless search. An officer was informed by one Reed that Reed was to buy counterfeit gasoline ration coupons from one Battita. Battita was followed as he went to the appointed

place. Officers approached the auto -- Reed had coupons in his hand and said he had received them from Battita, who was sitting in the driver's seat. Di Re was a passenger, and the officers had no information whatsoever regarding him. He was arrested and searched, and counterfeit coupons found on his person. The court held that simply because there was probable cause to believe that Battita possessed coupons this gave no probable cause to search Di Re, nor to arrest him. This opinion, however, contains some unfortunate dicta. The government had conceded that a warranted search of premises would not justify a search of persons on the premises (the precise question at issue here), and the court reasoned that an unwarrated search of an auto would not justify a search of all occupants. But clearly the facts

demonstrate that the officers only had reason to believe Reed and Battita possessed coupons. To cite Di Re for the proposition that a private premises directed warrant will not allow a search of the person is thus misleading.

Although recognizing that it was unable to persuade a majority of the Court in Ybarra, petitioner submits that the logic of Justice Rehnquist's dissent is compelling in considering a search of persons on private premises. A search warrant is an anticipatory authorization to search. Just as officers cannot necessarily foresee the existence of closets, cupboards, desks, nightstands, and briefcases, neither can they necessarily foresee the existence of persons with either an interest in the items to be seized or an interest in

frustrating the warrant. Where the warrant clause has been satisfied and probable cause to search private premises determined by a neutral judicial officer, a search of reasonable intensity for the sought after items is permitted. A search of reasonable intensity includes the pockets of persons on private premises where the items named in the warrant could be concealed on the person.

That a police officer armed with a search warrant for premises may conduct a search of reasonable scope and intensity of persons on the premises where the items named in the search warrant could reasonably be expected to be concealed on the person is commended by policy and logic, particularly when the existence of knock and announce requirements is considered. Before officers executing a

search warrant may force entry they must request admittance, giving notice of their authority and purpose. MCL 780.656. Case law holds that after announcing their authority and purpose the officers must wait long enough for the inhabitants of the premises to reach the door from the room farthest away before forcing entry. See e.g. People v Harvey, 38 Mich 39; 195 NW 2d 773 (1972). Obviously, it would be a simple matter for a person present in the premises to pick up the item named in the warrant and put it in his pocket (where the item is of a sort easily concealed in a pocket). Or, upon seeing the approach of officers a person present in the premises could put the item, for example, a package of Heroin, in his pocket and walk out the door. Perhaps not observing the officers, one present in the premises

might put the Heroin in his pocket and walk out the door on the way to a delivery. The purpose of the warrant should not be frustrated by such facile maneuvers. A search of reasonable scope and intensity of persons on private premises which are being searched pursuant to a warrant, where the items sought could easily be concealed on the person, considering the pockets of the persons to be places within the premises and thus covered by the warrant, is a reasonable search, and thus within the Fourth Amendment. The search in the instant case was within the scope of the warrant.

Petitioner would here note parenthetically that the issue here is <u>not</u> one of state law. The Michigan Court of Appeals decision was grounded <u>solely</u> on

federal law (Ybarra), and the Michigan Supreme Court has held that there is not a different standard under the Michigan search and seizure provision unless that court specifically says so on a particular issue, and it has not here. See People v Nash, 418 Mich 196 (1983). See also Michigan v Long, __ US __, 77 L Ed 2d 1201 (1983)

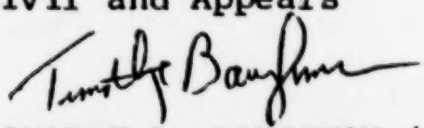
CONCLUSION

WHEREFORE, Petitioner concludes that this Court should grant plenary review, reverse the Michigan Court of Appeals, hold that the substance seized from respondent may be admitted at trial consistent with the Constitution, and remand for proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

EDWARD REILLY WILSON
Deputy Chief,
Civil and Appeals



TIMOTHY A. BAUGHMAN (P-24381)
Principal Attorney
Research, Training
and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313)224-5794

Dated: October 15, 1984
TAb:dh

APPENDICES

OPINION OF THE MICHIGAN COURT OF APPEALS

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant

V

May 18, 1984

CAROLIN BURBANK
Defendant-Appellee.

Docket No. 70711

Before: T.M. Burns, P.J., Wahls and W.F. Hood, *JJ.

PER CURIAM

Defendant was charged with possession with intent to deliver amphetamine. MCL 333.7401; MSA 14.15(7401).

At a suppression hearing, Officer Charnitta Perdue testified that she entered a home in Detroit on October 5, 1982, to execute a search warrant. When

*Circuit judge sitting on the Court of Appeals by assignment.

she arrived, she noticed several police officers and that five adults and some children were up against a wall with their hands on the wall. Officer Perdue observed bulges in the brassiere of Mrs. Burbank. She took Mrs. Burbank into another room and searched under her clothes. She removed from Mrs. Burbank's clothing three vials containing alleged controlled substances which formed the basis of this prosecution. The search warrant directed the police to search the premises and certain named individuals. Mrs. Burbank was not among those named in the warrant. The trial court suppressed the evidence and dismissed the case. The prosecutor appeals by right.

The prosecutor argues that even though defendant was not named in the warrant,

she was properly searched under the warrant and the evidence seized from defendant was, therefore, admissible. We find that this case is controlled by Ybarra v Illinois, 444 US 85; 100 S Ct 338; 62 L Ed 2d (1979), and affirm.

In finding Ybarra controlling, we must distinguish Michigan v Summers, 452 US 692; 101 S Ct 2587; 69 L Ed 2d 340 (1981). In Ybarra, the police learned that a bartender was selling drugs in a tavern. A warrant was issued allowing for the search of the tavern and the bartender. 444 US 88. Defendant was a patron of the bar while the police executed the search warrant. The police detained defendant and patted him down. The officer patting defendant down noticed defendant had a cigarette pack

which felt like it might have something in it. The officer seized this cigarette pack and found that it contained packets of heroin. The Court found that since the police did not have probable cause to search defendant, the evidence should be suppressed. 444 US 96.

In Michigan v Summers, defendant lived in the house which was the subject of the search warrant. Defendant was not named in the warrant. The police were about to execute the warrant when they found defendant on the front steps of the house. The officers asked defendant for his assistance in gaining entry to the house and then detained defendant while they searched the premises. 452 US 693. The police searched the house and found narcotics. They then arrested defendant

and searched his person. They also found narcotics on defendant. The Court found that the narcotics seized from defendant were admissible distinguishing Ybarra:

> "The 'seizure' issue in this case should not be confused with the 'search' issue presented in Ybarra v Illinois, 444 US 85, 62 L Ed 2d 238, 100 S Ct 338. In Ybarra, the police executing a search warrant for a public tavern detained and searched all of the customers who happened to be present. No question concerning the legitimacy of the detention was raised. Rather, the Court concluded that the search of Ybarra was invalid because the police had no reason to believe he had any special

connection with the premises, and the police had no other basis for suspecting that he was armed or in possession of contraband. See Id., at 90-93, 62 L Ed 2d 238, 100 S Ct 338. In this case, only the detention is at issue. The police knew respondent lived in the house and they did not search him until after they had probable cause to arrest and had done so." 452 US 695, n 4.

The instant case is distinguishable from Summers for the same reasons. Mrs. Burbank did not live in the house that the police were searching. The police also did not have probable cause to arrest Mrs. Burbank. While Officer Perdue testified that she observed bulges

in defendant's clothing, she stated that she had no idea of what caused the bulges until she searched under defendant's clothes. Since it was not apparent that Mrs. Burbank possessed illegal contraband, Officer Perdue could not arrest defendant or extend the warrant tc search her. People v Secrest, 413 Mich 521, 528; 321 NW2d 368 (1982).[1]

The fact that another person on the premises was found to possess contraband also did not provide probable cause to search defendant. As stated in Ybarra:

> "(2) It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed.

But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Sibron v New York, 392 US 40, 62-63, 20 L Ed 2d 917, 88 S Ct 1889, 44 Ohio Ops 2d 402. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the

'legitimate expectations of privacy' of persons, not places. See Rakas v Illinois, 439 US 128, 138-143, 148-149, 58 L Ed 2d 387, 99 S Ct 421; Katz v United States, 389 US 347, 351-352, 19 L Ed 2d 576, 88 S Ct 507.

(3a) Each patron who walked into the Aurora Tap Tavern on March 1, 1976, was clothed with constitutional protection against an unreasonable search or an unreasonable seizure. That individualized protection was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by the proprietor of the tavern or by 'Greg'. Although the search warrant, issued upon

probable cause, gave the officers authority to search the premises and to search 'Greg', it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers." 444 US 91-92 (footnotes omitted).

The prosecutor further argues that Ybarra is distinguishable since in the instant case defendant was visiting a private residence, not a public place such as a tavern. We are unable to make such a distinction. Defendant could legitimately expect as much privacy, if not more, when visiting her friends than while being a patron in a public place.

After carefully considering the arguments, we find the trial court properly suppressed the evidence and dismissed the case. Affirmed.

---

[1] In People v Nash, ____Mich____; ____NW2d____(Docket No. 68280, rel'd 12/19/83), the Supreme Court expressed limited disapproval of Secrest, supra. Nash, however, does not affect our decision.

/s/ Thomas M. Burns

/s/ Myron H. Wahls

/s/ William F. Hood

ORDER OF THE MICHIGAN SUPREME COURT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 7th day of September in the year of our Lord one thousand nine hundred and eithty-four.

Present the Honorable G. MENNEN WILLIAMS, Chief Justice

THOMAS GILES KAVANAGH,

CHARLES L. LEVIN,

JAMES L. RYAN,

JAMES H. BRICKLEY,

MICHAEL F. CAVANAGH,

PATRICIA J. BOYLE,

Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SC: 74398

COA: 79711 (__MA__)

LC: 82-06606

CAROLIN BURBANK

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court.

Boyle, J., would grant leave to appeal.

STATE OF MICHIGAN -- ss.

I, CORBIN R. DAVIS, Clerk of the

Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court (seal) at Lansing this 7th day of September in the year of our Lord one thousand nine hundred and eighty-four.

/s/Jacqueline B. MacKinnon
Deputy Clerk

ORIGINAL

RECEIVED
DEC 31 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 84-803

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Supreme Court, U.S.
FILED
DEC 31 1984
ALEXANDER L. STEVAS
CLERK

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

CAROLIN BURBANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

F. RANDALL KARFONTA

Attorney for Respondent
One Kennedy Square
Suite 1930
Detroit, Michigan 48226
Telephone: (313) 962-7210

QUESTION PRESENTED

DOES THE FOURTH AMENDMENT PROHIBIT THE PERSONAL SEARCH OF A CITIZEN IN A PRIVATE RESIDENCE WHERE (1) THE SEARCH WARRANT DOES NOT AUTHORIZE THE SEARCH OF THAT CITIZEN, (2) WHERE THE SEARCHING OFFICER DID NOT READ THE SEARCH WARRANT, (3) WHERE THE OFFICER DID NOT TESTIFY TO A SEARCH FOR REASONS OF SAFETY , AND (4) WHERE THE OFFICER DID NOT TESTIFY TO A SEARCH SUSPECTING CONTRABAND?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INDEX OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
CONCLUSION	6
RELIEF REQUESTED	6
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

Cases	Page
Dunaway v. New York, 442 U.S. 200 (1979)	4
Segura v. United States, _____U.S.____ (1984)	6
Sibron v. New York, 392 U.S. 40 (1968)	5
Stanford v. Texas, 379 U.S. 476 (1965)	6
State v. Broadnax, Wash., 654 P.2d 96 (1982)	4
Terry v. Ohio, 392 U.S. 1 (1968)	3,4
United States v. Di Re, 332 U.S. 581 (1947)	4
United States v. Leon, ____U.S.____ (1984)	4
Ybarra v. Illinois, 444 U.S. 85 (1979)	3,4

No. 84-803

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

CAROLIN BURBANK,

Respondent.

---/

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported as yet. (Pet. App. A) The Order of the Michigan Supreme Court is unreported. (Pet. App. B)

JURISDICTION

Respondent accepts Petitioner's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COUNTERSTATEMENT OF THE CASE

Defendant was charged with possession with intent to delivery methamphetamine. The preliminary examination and a subsequent evidentary hearing comprise the record in this case.

Carolin Burbank was present in a home subject to a search warrant for controlled substances.

When police officer Charnitta Perdue entered the dwelling, Carolin Burbank was in the living room facing the wall:

> Q Do you know whether that search warrant authorized you to search individuals on the premises?
>
> A I didn't read the search warrant to know what was in it. (Prelim. Exam. 23)

The officer noted something in Carolin Burbank's brassiere.

> Q What did those bulges look like?
>
> A I couldn't really say what it looked like. It was something in there that didn't belong there. (Prelim. Exam. 25) (Emphasis added)
>
> . . . .
>
> A It looked like something that she had just stuck in her brassiere. What, I don't know. (Prelim. Exam. 25-26)

Alone with Carolin Burbank, Officer Perdue took Carolin Burbank to a room and removed the items.

Officer Perdue gave no testimony regarding fear of Carolin Burbank, any suspicion regarding weapons, nor a need for protection:

> Q You didn't ask anybody to assist you because you were afraid; isn't that right?
>
> A That's correct. (Evid. Hearing 14)

Officer Perdue gave no testimony that she thought the "something" was contraband. She gave no testimony that she had personal experience regarding concealed contraband.

REASONS FOR DENYING THE WRIT

> The Fourth Amendment prohibits the personal search of a citizen in a private residence where (1) the search warrant does not authorize the search of that citizen, (2) where the searching officer did not read the search warrant, (3) where the officer did not testify to a search for reasons of safety, (4) where the officer did not testify to a search suspecting contraband.

A.

Individualized cause to search a citizen is required.

The protections of the Fourth and Fourteenth Amendments do not give way to permit evidence searches of persons who, at the commencement of a search, are on compact premises subject to a search warrant.

In Ybarra v. Illinois, 444 U.S. 85 (1979), this Court reaffirmed this proposition. 444 U.S. at 94. In that case, the State sought to apply the Terry v. Ohio, 392 U.S. 1 (1967), reasonable belief or suspicion standard to aid the evidence-gathering function of the search warrant. This Court rejected the proposed constitutional infringement, saying:

> The long prevailing constitutional standard of probable cause embodies the best compromise that has been found for accomodating the often opposing interests' in safeguarding citizens from rash and unreasonable interferences with privacy and in seeking to give fair leeway for enforcing the law in the community's protection. 444 U.S. at 95.

In Ybarra the State failed in its attempt to bypass the probable cause standard. This Court refused to permit searches of such persons "at least where police have a reasonable belief that such persons are connected with drug trafficking and may be concealing or carrying the contraband." Id. at 94.

Here, the State seeks review of a proposition far beyond that already rejected in Ybarra.

The rule sought by the State eliminates the following constitutional protections:

(1) Probable cause to believe that the persons to be searched are connected with the crime.

(2) Reasonable belief that the person to be searched is dangerous.

(3) This Court's emphasis on the rule of the magistrate in directing who will be searched pursuant to a warrant. See, e.g., United States v. Leon, ____ U.S. ____ (1984).

(4) The basic tenet that merely associating with a person suspected of criminal activity does not strip away the protections of the Fourth Amendment. State v. Broadnax, Wash., 654 P.2d 96 (1982) (search of private residence where narcotics had probably been sold within the preceding 24 hours; held, regardless of the setting, constitutional protections are held individually).

In reaffirming the probable cause requirement, Ybarra recognized that over 30 years ago the Court rejected a similar argument in United States v. DiRe, 332 U.S. 581 (1947).

Similarly, in Dunaway v. New York, 442 U.S. 200 (1979), where seizure was the issue, the Court declined the State's invitation to dispense with the probable cause requirement:

> The requisite balancing has been performed in centuries of precedent and is embodied in the principle that seizures are reasonable only if supported by probable cause.

Similarly, it seems clear that the Terry limits upon the intensity of the search should generally be applicable in this situation as well:

> Under that doctrine a law enforcement officer for his own protection and safety may conduct a pat down to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted. Ybarra v. Illinois, 444 U.S. at 93. See also Sibron v. New York, 392 U.S. 40, 64 (1968).

The operating principle is the sound one of requiring individualized justification before government interfers with the right to privacy, including (1) articulated reasons for initiating a search of a citizen, and (2) articulated reasons for intensifying the search.

For example, here Officer Perdue, the Officer who conducted the search of Carolin Burbank, (1) had not read the

search warrant, (2) gave no testimony that this search was for self protection, (3) gave no testimony that she thought the items might be contraband, and (4) testified simply that "I couldn't really say what it looked like." (Prelim. Exam. 25)

The present rule protects a doctor making a house call, a plumber, a neighbor, a television repairman, a school teacher discussing the progress of children, and all others when there is not demonstrable nexus with danger or crime.

The principle which emerges from the decisions is that it is not constitutionally permissible to search a person, not connected in any way with the place being searched, who merely happens to be upon the premises and who is not mentioned or described in the affidavit of probable cause upon which the warrant was issued. Rather, the law requires that there be probable cause to believe that such persons are themselves participating in criminal activity, or, somewhat more precisely, that there be probable cause that evidence which might be concealed or destroyed is to be found upon the person searched. This is certainly correct, for a broader power to search persons present at the place to be searched would provide for a general search or one conducted on mere suspicion.

B.

General Warrants are prohibited.

Here, someone in the house allegedly sold heroin to an informant.

The officer who searched Carolin Burbank did not read the search warrant.

Here, the officer ignored the search warrant. The requirement of particularity is to give direction to police.

The Fourth Amendment protects persons. The requirement of individualized cause to search a citizen cannot be deleted from it in the categorical fashion sought here. If police can search any place or any person found on premises during execution of a search warrant without regard to the specific directions in

the warrant, then they are effectively operating under a general warrant and usurping the function of the magistrate.

Specificity is the primary buffer placed between governmental intrusion and the individual. In discussing the Fourth Amendment in Stanford v. Texas, 379 U.S. 476 (1965), Justice Stewart, expressing the unanimous view of the Court, wrote:

> The hated writ of assistance had given Customs officials blanket authoritity to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," because they placed "the liberty of every man in the hands of every petty officer." 379 U.S. at 481-482.

Finally, the preferred status afforded privacy in the home does not evaporate upon initial entry:

> The home is sacred in Fourth Amendment terms not primarily because of the occupants possessory interest in the premises, but because of their privacy interests in activities that take place within. Segura v. United States, ____ U.S. ____ (1984).

The primacy of these protections is apparent from the language of the Fourth Amendment itself, the right of the people to be secure in their persons, houses ... against unreasonable searches and seizures, shall not be violated[.]

A search warrant for a place does not permit police searches of individuals absent articulated cause.

CONCLUSION

The principles involved herein are matters well settled by recent and time honored case authority. The decision below was required by the record in this case. It was reached using correct legal principles, is not in conflict with any other decision, and is dependent solely upon its own unique facts.

RELIEF REQUESTED

The petition for a writ of certiorari should be denied.

Respectfully submitted,

F. RANDALL KARFONTA (P25713)
Attorney for Respondent
One Kennedy Square
Suite 1930
Detroit, Michigan 48226

Dated:

NO. 84-803

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

CAROLIN BURBANK,

Respondent.

CERTIFICATE OF SERVICE

F. RANDALL KARPONTA, in compliance with Supreme Court Rule 28.4(a) and 28.5(b) does hereby certify that he is a member of the Bar of the Supreme Court and that on the 24th day of December, 1984, did deposit in the United States mail with postage fully prepaid, one (1) copy of the Brief for Respondent In Opposition addressed to Timothy A. Baughman, Principal Attorney, 12th Floor, 1441 St. Antoine, Detroit, Michigan 48226.

E. Randall Karponta

F. RANDALL KARPONTA